

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
Region 32**

**LAND O LAKES, INC.**

**(Tulare, CA)**

**Employer<sup>1</sup>**

**and**

**Case 32-UC-378**

**INTERNATIONAL BROTHERHOOD OF  
TEAMSTERS UNION, LOCAL NO. 517, AFL-CIO**

**Petitioner/Union<sup>2</sup>**

**DECISION AND ORDER**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein called the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein called the Board.

Pursuant to Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, I find:<sup>3</sup>

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the National Labor Relations Act and it will effectuate the purposes of the Act to assert jurisdiction herein.<sup>4</sup>

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<sup>1</sup> Herein called the Employer

<sup>2</sup> Herein called the Union

<sup>3</sup> The Employer and the Union filed briefs, which have been duly considered.

3. The parties stipulated and I find that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.
4. The labor organization involved claims to represent certain employees of the Employer.<sup>5</sup>
5. By its petition the Union seeks to clarify the bargaining unit to include approximately five full-time and regular part-time milk-testing technicians who are employed by the Employer at its Tulare, California facility. The Employer opposes such clarification. It contends: 1) that the milk testing technicians do not share a sufficient community of interest to be included in the bargaining unit covered by the collective bargaining agreement between the parties; and 2) that the milk testing technicians are akin to guards and other security personnel or are confidential employees and therefore should be excluded from the bargaining unit. The Employer also appears to be contending the Petitioner waived its right to seek inclusion of the disputed employees in the bargaining unit when it agreed, prior to its creation of the milk testing technician position, that any employees employed in this position would not be included in the bargaining unit.

### THE FACTS

The Employer is a cooperative owned by dairy farmers which processes whole milk into a variety of dairy products. Its operations include separating

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<sup>4</sup> The parties stipulated that the Employer, a Minnesota corporation with a facility located in Tulare, California is engaged in the non-retail sale and delivery of milk products. During the preceding twelve-month period the Employer purchased products valued in excess of \$50,000 directly from suppliers outside the State of California.

<sup>5</sup> The parties' current 1999-2003 collective bargaining agreement covers a unit of all production, maintenance, and driving employees, including laboratory and service department employees, excluding clerical employees, guards and supervisors as defined in the Act.

cream from milk, pasteurizing it, processing butter, cream cheese, and hard cheese. It also produces yogurt and dried (powdered) milk.

The Union and Dairyman's Cooperative Creamery Association, herein Dairyman's, were parties to a collective bargaining agreement for approximately 30 years. There is no evidence that the Board ever certified the Union.

Dairyman's was part of a multi-employer group that had successive collective bargaining agreements with the Union. Over the years the parties entered into exhibits, schedules, addendum, supplements, and side letters that were incorporated into the collective bargaining agreements. In 1998 Dairyman's merged with the Employer which adopted the collective bargaining agreement that was in effect at that time. The parties negotiated the current successor agreement in 1999.

Currently, driver employees, (approximately 110), bring tankers of milk to the processing facility each day, where it is tested by the milk testers for the presence of antibiotics before it is pumped into the main storage tanks on the premises. Milk that tests positive for antibiotics cannot be processed at the plant.

Previously, laboratory-technician bargaining unit employees performed the antibiotic testing using a petri-dish method. The drivers would pick up milk at several farms before returning to the plant. They would take samples at each farm as well as a composite sample from the full tanker. When the driver returned to the facility the laboratory technicians would test the composite samples. The petri-dish test used at that time took three to four hours, and the milk brought into the plant was not held up pending the test results. If it tested

positive the laboratory technician would test the individual farm's samples to identify the farm from which the "tainted" milk had come. The laboratory technicians kept their test results in a log kept in the lab and reported the results to the laboratory supervisor who would in turn notify the transportation supervisor. The laboratory technicians were certified by the State to perform these tests and to "condemn" milk that tested positive for antibiotics. They also logged positive results on an "Abnormal Milk Form."

Approximately 15 years ago, faster and easier antibiotic tests became available. These "charm tests" took only eight minutes to perform. At this time the drivers began doing the initial antibiotic test in the 'Charm Lab," although the laboratory technicians continued to do the confirming tests. About 10 years ago, the laboratory technicians stopped performing confirming tests because Tulare County assumed this responsibility. The procedure at that time was that if the driver obtained a positive on the charm test, then a laboratory technician repeated the test and if the result was again positive, the County sent an inspector to pick up the sample to be tested by the County. If the County confirmed the presence of antibiotics, it condemned the milk. The driver completed the "Abnormal Milk Form" to document the initial positive result. The drivers continued performing charm tests until July 2000.

On May 25, 2000, the Tulare County Health & Human Services Agency notified the Employer that effective June 30, 2000, the Tulare/Kings Milk Inspection Service would no longer be providing drug residue confirmation sampling and analysis and that it should be prepared to assume the

responsibility of obtaining confirmation drug residue sample analysis from a State and Federal certified laboratory, as specified in California Code of Regulations, Title 3, Section 576.1, beginning July 1, 2000. At that time the Employer met with the Union and informed it that the County would no longer perform confirmation testing. The Union was also informed that it was now the Employer's responsibility to perform the testing and to this end it would be hiring employees whose job would be to perform all the required testing. In this regard, the drivers would no longer be performing the snap test – the last form of antibiotic testing performed by the drivers. At this meeting the Union, based on its understanding that these new positions were being created because of a change in the law and would have supervisory responsibilities and duties, agreed that the employees hired to fill these positions would be excluded from the bargaining unit.

The first milk-testing technician (hereafter technician) was hired by the Employer in September 2000. From July 1 until that time, the Employer used its supervisors to perform the required testing. The Employer informed this technician that it was hiring a separate group of employees to do the milk testing because the Employer wanted the persons doing the testing to focus solely on their job, as opposed to having the drivers perform the testing. This technician was also informed that if she came up with a positive result, before being licensed by the State, she would have to contact one of the supervisors, but after they were certified they would no longer be required to do so.

The Employer ultimately employed five employees in the technician position. (Four full-time and one part time who works one day a week.) These employees work different shifts (6:00 a.m. to 2:00 p.m., 2:00 p.m. to 10:00 p.m. and 10:00 p.m. to 6:00 a.m.) in the “charm lab.” When the Employer’s drivers reach the Tulare facility they bring a tube of milk which has been drawn from their truck to a technician.<sup>5</sup> The technician removes a sample of milk from the tube and places it in a 300 UL pipette along with a laboratory test strip. The technician then places the pipette in an incubator for eight minutes. If antibiotics are present in the milk the test strip will so indicate. After doing a visual inspection, the technician places the test strip in a ROSA-Reader (the “charm test”), which verifies the results. If the initial test produces a negative result then the technician indicates the result on a form that has already been partially completed by the driver. Once the technician certifies the negative result then the driver is free to leave and the receivers, whose responsibility is to ensure that the milk coming into the plant is routed to the correct areas of the plant, direct the milk to the proper location. If the Charm Test results are positive then the technician performs a different test on the sample to confirm the result. Once the positive is confirmed then the technician is responsible for performing tests on the milk from each dairy with milk in the tanker.<sup>6</sup> The technician then fills out an “Abnormal Milk Form.” This form is used once the first sample indicates a positive result.<sup>7</sup> This form is also partially completed by the driver. The

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<sup>5</sup> Each truck contains milk from as many as three or four different dairies.

<sup>6</sup> The dairy that provides the contaminated milk has financial liability to the other dairies for contaminating their milk.

<sup>7</sup> The drivers also fill out this form for “hot milk,” milk which is over a certain temperature.

technician completes the part captioned “test performed by lab technician/certified industry supervisor.” The technician contacts the transportation supervisor if the result of the initial test is positive. At that point, the tanker is tagged. After running the second test the technician again contacts the transportation supervisor and that person fills out the last section of the form. The technician is also required to call the County and inform it of the initial positive result. The technician then completes another form for the County. The technician also is required to fill out a third form that tracks the milk testing procedure from start to finish. If a milk sample tests positive for antibiotics the transportation department goes to the supplying dairy and takes another sample for testing. The technician performs the same tests on this sample. The technician has the authority based on the results of the tests he or she performs, to reject the milk in the tanker – subject to final approval by the transportation supervisor.

The requirements for the technician positions are a high school education, with college courses preferred, but not required. No special training or education is required, just basic computer skills, ability to obtain state certification, communication and organizational skills and the ability to work alone. The technicians are paid \$10 an hour and use the same time clock as all of the other bargaining unit employees. The technicians work the same schedule as the bargaining unit employees -- a straight eight-hour shift, with no formal break and a five-day week with rotating days off. All the employees receive the same benefits, i.e., medical, dental, vision and a 401(k) plan. The technicians use the

same break room in the scale house that the drivers use. The technicians and drivers wear apparel with the Land O Lakes logo on it.

Currently, unit laboratory technicians perform tests on raw product from the dairy and finished product. These tests include: bacteriological tests, testing for fat, solids, protein, and moisture. The bacteriological tests performed by the laboratory technicians are done on a random basis on the samples provided by the individual dairies. A positive test result does not cause the milk to be condemned because the pasteurization process rids the milk of any bacteria. The laboratory technicians do not have any interaction with the technicians, except approximately once a day when the milk-receiving technicians come into the laboratory to pick up supplies.

The technicians work without immediate supervision in the charm lab. The immediate supervisor may come to the lab once a day for the day shift employees, but not at all on the other shifts. The technicians perform at least 100 tests a shift and there is a constant flow of drivers coming into the charm lab bringing their milk samples. There may be as many as 10 drivers in the charm lab at one time waiting for the results of the test on their milk sample. Receivers are also in the charm lab on a regular basis and interact with the technicians.

#### POSITIONS OF THE PARTIES

The Employer contends that the technicians should not be made a part of the existing bargaining unit represented by the Union. Specifically, the Employer contends that there is a lack of community of interest between the technicians and the bargaining unit employees. In addition, the Employer asserts that these

employees are akin to guards or confidential employees, and therefore should not be included in the bargaining unit. The Employer also contends that the Union waived its right to seek inclusion of the technicians by its initial agreement to exclude the technicians from the bargaining unit.

The Union argues that the technicians should be accreted to the bargaining unit because they have a strong community of interest with the other bargaining unit employees, and are not guards or confidential employees. The Union also contends that its initial agreement to exclude the technicians from the unit was based on misinformation given by the Employer, and that agreement was retracted immediately upon the determination that the information was inaccurate.

### ANALYSIS

#### **1. There is a Community of Interest Between the Technicians and the Bargaining Unit Employees**

The Employer contends that the technicians should be excluded from the bargaining unit because they do not share a sufficient community of interest with the bargaining unit employees. Several factors enter into a finding of community of interest, including a finding of a degree of functional integration, centralization of management and administrative control, geographic proximity, similarity of working conditions, skills and functions, common control of labor relations, collective bargaining history, and interchange of employees. *NLRB v. Paper Mfrs. Co.*, 786 F.2d 163.

The Employer contends that in some cases, one or two critical factors may outweigh the existence or absence of any other community interest analysis factors, and that employee interchange and common day-to-day supervision are the two most important factors in a community of interest analysis. *Towne Ford Sales*, 270 NLRB 311. The Employer argues that here, although there is undisputed evidence of a degree of functional integration, geographic proximity, similarity of working conditions, similarity of skills and functions, and a collective bargaining history, a community of interest is not present because 1) there is no interchange of employees between the technicians and the bargaining unit except for supervisors, and 2) since the technicians are supervised by their own supervisor, there is no centralized management and control of labor relations

#### Interchange of Employees

It is clear from the foregoing that the technicians and the bargaining unit employees share substantial terms and conditions of employment, including interchangeability and frequent contact among the bargaining unit employees. The technicians interact with the bargaining unit employees continuously during their shifts. The Employer also posts “interest sheets” for non-collectively bargained positions, including the technician jobs, to which members of the bargaining unit are able to apply. Although there has not yet been any interchange of technicians with other classifications, (the positions have only been in existence since September 18, 2000) the potential for interchange is present.

## Centralized Management and Control of Labor Relations

It is also clear that the management and control of labor relations is centralized, as the technicians and the bargaining unit employees are all in the production department headed by Bob Brown. *Safety Carrier, Inc.*, 306 NLRB 960, 969 (1992). The technicians are directly supervised by their own supervisor, Jo Oliveira, who is the quality control supervisor. However, Ann Shaw is the laboratory supervisor and she acts as the technician supervisor in Oliveria's absence. Oliveira and Shaw also work with the transportation supervisors who manage the drivers. Additionally, the technicians work the same schedule as the bargaining unit employees, receive the same benefits, use the same break room and wear the same uniform.

## **2. The Employees Are Not Guards or Confidential Employees**

At the hearing, the Employer asserted that the technicians should be excluded from the bargaining unit because their responsibilities and duty of loyalty to the employer are analogous to those of guards or confidential employees. The Employer argued that the special nature of the technicians' work, specifically the power to condemn the Employer's product, necessitates a loyalty to the Employer that likens the technicians to guards or confidential employees. The Employer did not pursue this argument in its post hearing brief. However, this contention is clearly without merit. To be a "guard" within the meaning of the Act, an employee must enforce rules against employees and other persons to protect the property of the employer's premises. *Petroleum Chemicals*, 121 NLRB 630 (1958); *Purolator Armoured, Inc.*, 268 NLRB 1268

(1984). These employees carry no such duties and clearly do not possess any indicia of guards. To be a confidential employee within the meaning of the Act, an employee must assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies with regard to labor relations, or regularly substitute for employees having such duties. *B.F. Goodrich Co.*, 115 NLRB 722,724 (1956). Here, there is no evidence that the employees have any sort of confidential status regarding labor relations. The technicians simply follow the legal requirements for conducting confirming tests and condemning milk, and are much more akin to traditional quality control employees, who are routinely included in collective bargaining units based on traditional community of interest standards, than they are to guards. *Blue Grass Industries*, 287 NLRB 274 (1987). There is no evidence here that the technicians meet the definition of guards or confidential employees.

**3. The Union Did Not Waive Its Right to Seek Inclusion of the Technicians by Its Initial Agreement to Exclude the Technicians from the Bargaining Unit.**

The Employer's apparent contention that the technicians should be excluded because the Union initially agreed to exclude them is without merit. The Union was told in a meeting with the Employer that these technicians would be supervisors and therefore they were properly excluded from the bargaining unit. Shortly thereafter, the Union became aware that the technicians were performing the same work formerly performed by the drivers and were exercising no supervisory authority, and it demanded that these employees be included in

the bargaining unit. The technician positions were created during the term of the collective bargaining agreement and therefore accretion is appropriate. *C.F. Plough, Inc.*, 203 NLRB 818 (1973).

The Union filed a grievance in January 2001 over the Employer's removal of bargaining unit work. Nevertheless, it is well established that the determination of questions of representation and accretion are matters for decision by the Board because they involve the application of statutory policy, standards and criteria, not contract interpretation. *Marion Power Shovel Company, Inc.*, 230 NLRB 576, 577-78 (1977); *St. Mary's Medical Center*, 322 NLRB 954 (1997).

The Employer also asserts in its brief that the Board follows a restrictive policy in finding accretions to existing units, and will not compel a group of employees to be included in an overall unit without an election or other evidence that they wish to authorize the Union to represent them. The Employer relies on *Melbet Jewelry Co.*, 180 NLRB 107, to support this contention, but it is factually inapposite to the case here, as *Melbet Jewelry* concerned a multi-location unit. This narrow construction of accretion is generally applied to the absorption of a new facility into an existing larger facility. *Towne Ford Sales*, 270 NLRB 311. Here, the technicians and the bargaining unit employees are employed at the same single facility.

After considering all of the above factors, I conclude that the milk-testing technicians share a substantial community of interest with the employees in the existing unit. I also conclude that the employees are not guards or confidential

employees within the meaning of the Act, and the union did not waive its right to seek inclusion of the technicians by its initial agreement to exclude the technicians from the bargaining unit. Accordingly, I will clarify the unit to include all full time and regular part time milk-testing technicians in the unit.

#### ORDER

IT IS HEREBY ORDERED that the bargaining unit represented by Teamsters Union Local 517, International Brotherhood of Teamsters, AFL-CIO be, and hereby is, clarified to include all full time and regular part time milk-testing technicians.

#### RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a Request for Review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14<sup>th</sup> Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board by July 25, 2001.

DATED AT Oakland, California, July 11, 2001.

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James S. Scott  
Regional Director  
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